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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

PETER MASTAN, as Trustee, etc., Plaintiff and Respondent, v. YEVGENIYA LISITSA et al., Defendants and Appellants.	B242638 (Los Angeles County Super. Ct. No. BC479471)

APPEAL from an order of the Superior Court of Los Angeles County, Alan S. Rosenfield, Judge. Affirmed.

Baker, Keener & Nahra, Mitchell F. Mulbarger and James D. Hepworth, for Defendants and Appellants.

Timothy D. McGonigle Professional Corporation and Timothy D. McGonigle, for Plaintiff and Respondent.

I. INTRODUCTION

Defendants, Yevgeniya Lisitsa, an individual and Lisitsa Law Corporation, appeal from an order denying a petition to compel arbitration of legal malpractice claims brought by Peter Mastan, in his capacity as Chapter 7 Trustee of the Estate of David Behrend. We affirm.

II. BACKGROUND

A. The Complaint

The complaint alleged plaintiff is the trustee in a pending bankruptcy action in the United States District Court for the Central District of California entitled *In re David Behrend*, U.S.B.C. Case No. 1:11-bk-11379-VK. Defendants are Mr. Behrend's former attorneys. Defendants allegedly committed malpractice or breached fiduciary obligations: (1) in insurance litigation against United National Insurance Company related to commercial liability and property coverage of real property located on 25th Street in Los Angeles; (2) in a wrongful death action entitled *Cardenas et al. v. Savvy Real Estate, Inc.*, et al., Los Angeles Superior Court Case No. 375941; and (3) in connection with a $57,000 second trust deed on the 25th Street property. The complaint included allegations defendants: failed to communicate settlement offers; failed to settle or advise Mr. Behrend of the risks of not doing so; represented Mr. Behrend with conflicts of interest with other clients; subjected Mr. Behrend to judgments of $2,030,445.65 and $1,142,044.50 in the insurance and *Cardenas* actions, respectively; failed to secure a second trust deed with $57,000 given to her by Mr. Behrend; and did not return the $57,500 to Mr. Behrend.

B. The Petition to Compel Arbitration

Defendants moved to compel arbitration of the malpractice action matter based a fee agreement signed by Mr. Behrend on October 14, 2006. The October 14, 2006 fee agreement was entered into for a matter entitled *In the Matter of Ardis Williams*. Section 1 of the October 14, 2006 fee agreement provides that the agreement is for legal services "in connection with a claim for damages or other appropriate relief against the clients in: *In the Matter of Ardis Williams*, Case No. BP098203." The fee agreement further states: "This Agreement does not cover other related claims that may arise and may require legal services. Should Client wish Attorney to handle such matters in the event they arise, separate agreements for those legal services will be required." Notably, the complaint does not make any legal malpractice claims against defendants related to the *Williams* matter.

In section 9 of the fee agreement, the parties agreed to binding arbitration in accordance with the rules of the American Arbitration Association. Section 9 of the fee agreement in part states: "If a dispute arises between Client and Attorney regarding Attorney's alleged malpractice in handling the said matter, or Attorney's fees for services and/or costs expenses in connection with the above referenced transaction, such dispute(s) shall be submitted to binding arbitration which shall be final, and both parties waive any right to jury trial of the matter. This includes any claim against Attorney for tort, malpractice, fraud, breach of contract, negligence, breach of fiduciary duty or other wrongdoing or breaches."

Ms. Lisitsa filed a declaration in support of the petition to compel arbitration. She declared that, after signing the October 14, 2006 fee agreement, Mr. Behrend continued to utilize her services on "other matters of the same general nature" including those in the complaint. Ms. Lisitsa declared: "On these subsequent matters, we determined, in accordance with Business and Professions Code section 6148 [subdivision] (d)(2), that it would not be necessary to enter into several subsequent fee agreements, but that we would continued[sic] to follow the terms and conditions of the Agreement in the *Williams*

matter. Accordingly, on subsequent matters, we followed the terms of the Agreement regardless of the matter in which the legal services were performed." Ms. Lisitsa cited as examples that Mr. Behrend paid for legal services and costs in the subsequent matters in the same amount and as he had in the *Williams* matter.

Citing Business and Professions Code section 6148, subdivision (d)(2), *Hilleary v. Garvin* (1987) 193 Cal.App.3d 322, 326 and *Reigelsperger v. Siller* (2007) 40 Cal.4th 574, 579-590, defendants asserted that the subsequent matters were subject to the arbitration provision in the *Williams* fee agreement. As an alternative claim, defendants argued the fee agreement specified that the American Arbitration Association rules governed the dispute. Under those rules the arbitrator determines his or her jurisdiction, including objections to the existence, scope, or validity of the arbitration agreement.

Plaintiff opposed the petition citing the absence of any evidence of a connection between the *Williams* matter and the complaint's allegations related to the legal malpractice in the insurance, wrongful death and trust deed claims. Mr. Behrend also declared that he never agreed that defendants would continue to represent him pursuant to the terms and conditions in the *Williams* matter. He did not agree to arbitrate any claims against defendants arising out of representation in the insurance, wrongful death, or second trust deed matters.

The trial court denied the petition to compel arbitration. In denying the petition, the trial court cited language from the October 14, 2006 fee agreement limiting its application to the *Williams* matter. Defendants filed a timely appeal from the trial court's order denying the petition to compel arbitration.

III. DISCUSSION

Both federal and state laws have strong public policies favoring arbitration as a speedy and relatively inexpensive means to resolve disputes. (*AT&T Mobility LLC v. Concepcion* (2011) 131 S. Ct. 1740, 1742, 1745; *St. Agnes Medical Center v. PacifiCare*

of California (2003) 31 Cal.4th 1187, 1204.) Code of Civil Procedure[1] section 1281.2 allows a party asserting there is a written agreement to arbitrate a controversy to petition the trial court to compel arbitration. Section 1281.2 requires the trial court to compel arbitration upon determination of a written agreement to arbitrate a controversy exists. Both the right and scope of arbitration are contractual matters. (§§ 1281, 1281.2; *Crowley Maritime Corp. v. Boston Old Colony Ins. Co.* (2008) 158 Cal.App.4th 1061, 1069; *Tobacco Cases I* (2004) 124 Cal.App.4th 1095, 1104.) Although there is a strong federal and state public policy in favor of arbitration, there is no public policy favoring arbitration of disputes, which parties have not agreed to arbitrate. (*Granite Rock Co. v. International Brotherhood of Teamsters* (2010) 130 S.Ct. 2847, 2856, 2859-2860; *Freeman v. State Farm Mut. Auto Ins. Co.* (1975) 14 Cal.3d 473, 481; *Villacreses v. Molinari* (2005) 132 Cal.App.4th 1223, 1230; *Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 653.) A "gateway" dispute as to whether an arbitration agreement exists is to be decided by the court. (*Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 84; *Burch v. Premier Homes* (2011) 199 Cal.App.4th 730, 746.) Before a party may be compelled to arbitrate a claim, the petitioning party has the burden of proving the existence of a valid arbitration agreement and the dispute is covered by the agreement. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972; *Rosenthal v. Great Western Financial Securities Corp.* (1996) 14 Cal.4th 394, 413-414.) If petitioner meets its burden, the respondent has to prove by a preponderance of the evidence any defense to the petition. (*Engalla v. Permanente Medical Group, Inc.*, *supra,* 15 Cal.4th at p. 972; *Rosenthal v. Great Western Financial Securities Corp.*, *supra*, 14 Cal.4th at p. 413.)

A petition to compel arbitration is merely a suit in equity for specific performance of the contract. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 787; see also *Jones v. Jacobson* (2011) 195 Cal.App.4th 1, 17.) Ordinary contract principles apply in interpreting arbitration provisions giving effect to the parties' mutual intent. (See Civ.

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

Code, § 1636; *Jones v. Jacobsen*, *supra*, 195 Cal.App.4th at p. 17; *EFund Capital Partners v. Pless* (2007) 150 Cal.App.4th 1311, 1321.) Absent some special or technical use, the clear and explicit meaning of contractual provisions (interpreted in light of the ordinary and popular sense) controls judicial interpretation. (Civ. Code, § 1644; *TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 Cal.4th 19, 27; *Victoria v. Superior Court* (1985) 40 Cal.3d 734, 744.) Because the material facts are undisputed, we review de novo the issue of whether an arbitration agreement existed. (*Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 202; *Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 208.)

Here, the parties dispute whether a valid agreement existed to arbitrate the disputes raised in the complaint based on the October 14, 2006 fee agreement executed by Mr. Behrend in connection with the *Williams* matter. By its express and unambiguous terms, the fee agreement governs legal services "in connection with a claim for damages or other relief against the clients in: *In the Matter of Ardis Williams*, Case No. BP098203." In addition, the fee agreement clearly excludes from its terms "other related claims that may arise and may require legal services." The fee agreement states that such matters would require "separate agreements for those legal services." The arbitration provision then states that it applies "[i]f a dispute arises between Client and Attorney regarding Attorney's alleged malpractice in handling the said matter, or Attorney's fees for services and/or costs expenses in connection with the above referenced transaction . . . ."

By its express terms, the October 14, 2006 fee agreement only applies to the *Williams* matter. Defendants do not claim that the complaint raises any disputes concerning the *Williams* matter. Furthermore, the fee agreement expressly excludes other legal matters from its coverage. Thus, defendants are incorrect in claiming the complaints in this action are subject to arbitration based on the fee agreement in the *Williams* matter.

However, defendants claim that there was an implied agreement to arbitrate the claims based on Business and Professions Code section 6148, subdivision (d)(2), *Hilleary*

v. Garvin, *supra*, 193 Cal.App.3d at page 326 and *Reigelsperger v. Siller*, *supra*, 40 Cal.4th at pages 579 through 580. None of these authorities require arbitration of the claims in this case. First, Business and Professions Code section 6148, subdivision (a) requires a written fee agreement when services rendered will exceed one thousand dollars. Section 6148, subdivision (d)(2) excludes from its coverage "[a]n arrangement as to the fee implied by the fact that the attorney's services are the same general kind as previously rendered to and paid for by the client." This statute regulating fee agreements says nothing about an implied agreement to arbitrate.

Second, the cases cited by defendants do not support an implied agreement to arbitrate the claims in the complaint. In *Hilleary*, at her initial treatment, a patient signed an arbitration agreement pursuant to section 1295 regarding medical malpractice claims. (*Hilleary v. Garvin*, *supra*, 193 Cal.App.3d at pp. 324-325.) The patient then sued the physician based on a follow-up surgical procedure, for which she did not execute a subsequent arbitration agreement. (*Ibid*.) The appellate court reversed an order refusing to compel arbitration. (*Id*. at p. 327.) *Hilleary* concluded section 1295 covered any contract for health care regardless of whether it was written or oral or express or implied. (*Hilleary v. Garvin*, *supra*, 193 Cal.App.3d at p. 327.) There was no evidence from which it could be reasonably concluded that the parties intended the follow-up surgery was severable from the initial treatment. (*Id*. at pp. 326-327.) As a result, the patient was bound by the section 1295 arbitration agreement. (*Ibid*.) This case is distinguishable from *Hilleary* because it does not involve a statutory arbitration provision for medical treatment. Rather, it involves a contractual arbitration provision contained in a legal fee agreement.

Moreover, the legal fee agreement by its express terms limits its application to one case: the *Williams* matter. The fee agreement then expressly excluded from its coverage any future legal matters, which is why defendants' reliance *Reigelsperger v. Siller*, *supra*, 40 Cal.4th 574, is also misplaced. In *Reigelsperger*, a patient signed an arbitration agreement with a chiropractor at the first treatment. (*Id*. at p. 576.) The patient sued for injuries based on a different treatment two years later. (*Id*. at pp. 576-577.) The

arbitration provision provided that the agreement intended to bind the parties "who now or in the future treat(s) the patient. . . ." (*Id*. at p. 577.) The patient also signed a consent form which stated: "'I intend this consent form to cover the entire course of treatment for my present condition and for any future condition(s) for which I seek treatment.'" (*Ibid*.) Our Supreme Court concluded the chiropractic patient was required to arbitrate the claims. (*Id*. at pp. 576, 578-580.) But, *Reigelsperger* does not support defendants' claim the *Williams* arbitration provision applies to the legal malpractice claims raised in the complaint. The present fee agreement expressly limits it coverage to the *Williams* matter and excludes from its coverage future legal matters.

The trial court did not err in concluding there was no valid agreement to arbitrate the legal malpractice claims in the current action.

IV. DISPOSITION

The order denying the petition to compel arbitration is affirmed. Plaintiff, Peter Mastan, in his capacity as Chapter 7 Trustee of the Estate of David Behrend is awarded his costs on appeal from defendants, Yevgeniya Lisitsa, an individual and Lisitsa Law Corporation.

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O'NEILL, J.*

We concur:

TURNER, P. J. MOSK, J.

* Judge of the Ventura Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.